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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO CASTRO PEREZ,

Defendant and Appellant.

2d Crim. No. B208893
(Super. Ct. No. KA066479)
(Los Angeles County)

OPINION ON REMAND

Pedro Castro Perez was convicted, after trial by jury, of evading an officer causing serious bodily injury (Veh. Code, § 2800.3), leaving the scene of an accident (Veh. Code, § 20001, subd. (a)), and driving without a valid driver's license (Veh. Code, § 12500, subd. (a)). The jury also found true the allegation that Perez had a prior serious or violent felony conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).¹ The trial court sentenced him to a total term of 15 years in state prison, consisting of a 5-year upper term for the evading an officer offense, doubled as a second strike, plus five years for the prior conviction enhancement under section 667, subdivision (a)(1).

On May 10, 2007, we issued an opinion concluding that Perez had been sentenced to the upper term on the evading an officer count in violation of *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). We vacated the upper term sentence,

¹ All further undesignated statutory references are to the Penal Code.

remanded for resentencing, and otherwise affirmed the judgment. Our Supreme Court granted review and transferred the matter back to this court with directions to vacate our prior decision and reconsider the matter in light of *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). We subsequently issued another opinion reiterating our conclusion that Perez had been sentenced to the upper term on the evading an officer count in violation of *Cunningham*. Accordingly, we vacated that sentence and remanded for resentencing. On remand, the trial court again imposed the upper term on the evading an officer count.

Perez now appeals from the upper term sentence imposed following remand, contending (1) he was resentenced under *Sandoval* and the amended version of section 1170, subdivision (b), in violation of ex post facto principles and his rights to due process and equal protection; and (2) the sentence was improper under former section 1170, subdivision (b), because the court failed to weigh the mitigating factors against the aggravating factors. We affirm.

STATEMENT OF FACTS

On the afternoon of May 21, 2005, a police officer pursued Perez for driving recklessly and at an unsafe speed. When Perez was forced to stop behind a truck, he drove onto the sidewalk. He then ran a red light, side-swiped a car, and collided with a pickup truck. Perez was apprehended as he ran from his vehicle. It was subsequently discovered that he did not have a valid driver's license. A passenger in the car he hit was seriously injured and was hospitalized for several weeks.

DISCUSSION

Perez contends the trial court erred in resentencing him to the upper term of five years on the evading an officer charge. He argues that the court violated ex post facto principles and his constitutional rights to due process and equal protection by resentencing him under *Sandoval* and the current version of section 1170, subdivision (b), which was enacted after he committed his crimes but before he was resentenced. (§ 1170, as amended by Stats. 2007, ch. 3, § 2, eff. Mar. 30, 2007.) He further asserts

that he was improperly sentenced under the former version of section 1170, subdivision (b), because the court failed to weigh the mitigating factors against the aggravating factors. There is no merit in either contention.

As Perez acknowledges, our Supreme Court has rejected his claims regarding the retroactive application of the amended version of section 1170, subdivision (b) (*Sandoval, supra*, 41 Cal.4th at pp. 853-857), and we are bound to follow that authority (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Under the amended version of the law, the midterm is no longer considered the "statutory maximum" as contemplated by *Cunningham*. Under the new version, the court need not engage in any additional fact finding to warrant imposition of the upper or lower term. (*Sandoval, supra*, at pp. 843-845.)

In any event, Perez cannot establish that his sentence is unauthorized under the *former* version of 1170, subdivision (b), much less the amended version.

Cunningham merely established that the former law was unconstitutional in that it "allows a judge to impose a sentence above the statutory maximum based on a fact, *other than a prior conviction*, not found by a jury or admitted by the defendant."

(*Cunningham, supra*, 549 U.S. at pp. 274-275, italics added.) In imposing the upper term on remand, the court expressly relied on Perez's poor performance on probation.² *Cunningham* does not prohibit trial courts from considering factors relating to the defendant's recidivism in deciding whether to impose the upper term under the former version of the law. (*Black II, supra*, 41 Cal.4th at pp. 818-820.) Moreover, our Supreme

² In resentencing Perez, the court stated: "For the purposes of the *Sandoval* issue, I'm going to reiterate all of my prior discussions and comments about the rules of court and the evidence. And for the purposes of non-*Sandoval* sentencing under the classic Scalia definition of fact of a conviction—and I would note for the record that apparently Justice Kennedy was not particularly persuasive since Justice Kennedy lost the arguments as to what constituted a fact of conviction [¶] Performance on probation is a classic item that judges have relied upon in assessing sentences and the level of sentences even as far back as [the] middle ages according to Justice Scalia. [¶] All right. In the defendant's Pomona theft case . . . , on probation at the time obviously did not change his behavior patterns one whisker. And on that, I'm going to base the usage of the high term of five years."

Court has recognized that findings regarding a defendant's prior performance on probation or parole fall within the "prior conviction" exception and therefore need not be found true by the jury to warrant consideration at sentencing. (*People v. Towne* (2008) 44 Cal.4th 63, 79-84.) The court has also held that the existence of only one aggravating circumstance that complies with *Cunningham* "renders a defendant *eligible* for the upper term sentence" such that "any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black II, supra*, at p. 812.)

While Perez does not take issue with the court's reliance on his recidivism as an aggravating factor, he contends this factor is insufficient to warrant imposition of the upper term under the former law because the court failed to consider factors in mitigation. He bases this claim on former rule 4.420 of the California Rules of Court, which provides among other things that "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." We reject this contention because Perez fails to affirmatively demonstrate that the court failed to consider any mitigating circumstances. Even if he could establish otherwise, the error would be harmless in light of our conclusion that he was properly sentenced to the upper term under the amended version of section 1170, subdivision (b).

The judgment is affirmed.
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PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Bruce F. Marrs, Judge
Superior Court County of Los Angeles

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